

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

APR 10 2009

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA ex rel.)	
VIRGINIA HELENE GRAMMAR,)	2 CA-CV 2008-0167
)	DEPARTMENT B
Petitioner/Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
CHRISTOPHER JUDE KAKAR,)	Appellate Procedure
)	
Respondent/Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. SE-200600239

Honorable Theresa H. Ratliff, Judge Pro Tempore

AFFIRMED

David Alan Dick and Associates
By David Alan Dick

Chandler
Attorneys for Respondent/Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Appellant Christopher Kakar appeals from the trial court's child support order and the order finding him in contempt of court for failing to pay child support. He argues that the support order is not supported by sufficient evidence. He asks this court to review the contempt order as a special action, asserting the finding of contempt is unjustified. We affirm for the reasons set forth below.¹

Background

¶2 The present enforcement action began in 2006 when the state filed a petition to modify Kakar's child support so that it would be consistent with the Arizona Child Support Guidelines. The trial court subsequently entered temporary, modified child support orders on two occasions. In February 2008, the court attributed \$3,000 in monthly income to Kakar based, in part, on his use of his employer's vehicle and lodging. The court then ordered Kakar to pay \$759 in monthly child support. Between 2007 and 2008, the court found Kakar in contempt of court on several occasions for failing to pay child support and failing to comply with other court orders.

¶3 In June 2008, Kakar filed a request to modify child support, seeking to reduce it because he was unemployed. At an evidentiary hearing on the motion, Kakar testified he had been without full-time employment for about six months; he was unable to find a job

¹Neither the state nor Grammar has filed an answering brief in this appeal. Although we may regard this as a confession of error as to any debatable issue, *see Guethe v. Truscott*, 185 Ariz. 29, 30, 912 P.2d 33, 34 (App. 1995), in the exercise of our discretion, we decline to treat it as such. *See In re Marriage of Diezsi*, 201 Ariz. 524, ¶ 2, 38 P.3d 1189, 1190 (App. 2002).

despite diligently searching for one; and the most income he was capable of earning was the federal minimum wage, which was then \$6.55 per hour. His former spouse, Virginia Grammar, testified Kakar had earned an hourly wage of \$9.75 at a home improvement store when their children were born, roughly eight years earlier. Based on Grammar's testimony, the court attributed to Kakar an adjusted gross monthly income of \$1,688.70 and ordered him to pay \$602.14 in monthly child support. The court filed its child support order September 5, 2008, and Kakar filed his notice of appeal October 3.

Child Support

¶4 Kakar argues “the current support order is not justified” because the trial court’s findings regarding his income were not supported by sufficient evidence. We review a trial court’s order modifying child support for an abuse of discretion. *Little v. Little*, 193 Ariz. 518, ¶ 5, 975 P.2d 108, 110 (1999). “An abuse of discretion exists when the record, viewed in the light most favorable to upholding the trial court’s decision, is ‘devoid of competent evidence to support’ the decision.” *Id.*, quoting *Fought v. Fought*, 94 Ariz. 187, 188, 382 P.2d 667, 668 (1963). We review any legal conclusions or questions of law de novo. See *McNutt v. McNutt*, 203 Ariz. 28, ¶ 6, 49 P.3d 300, 302 (App. 2002); *Burnette v. Bender*, 184 Ariz. 301, 304, 908 P.2d 1086, 1089 (App. 1995).

¶5 When modifying child support pursuant to A.R.S. §§ 25-320(A) and 25-327(A), a trial court must consider the Arizona Child Support Guidelines promulgated by our supreme court. See § 25-320(D); see also § 25-320 app. § 3. The Guidelines are not

substantive law but procedurally guide courts in applying the law. *Little*, 193 Ariz. 518, ¶ 6, 975 P.2d at 111. Under the Guidelines, a parent’s child support obligation is largely determined by his or her gross monthly income, *see* § 25-320 app. § 10, and a court must order a noncustodial parent to pay the amount provided by the Guidelines unless inappropriate or unjust. *See* § 25-320 app. § 3. But, it is not necessarily unjust for a court to base a child support order on a parent’s past income rather than the parent’s actual income. *See, e.g., Little*, 193 Ariz. 518, ¶¶ 6, 18-19, 975 P.2d at 111, 114 (affirming child support order based on parent’s income prior to becoming full-time student). And, a court may consider if a parent is “unemployed or working below full earning capacity” and any reasons therefor when determining the amount of child support the parent should pay. § 25-320 app. § 5(E).

¶6 Here, the trial court implicitly found that Kakar did not have adequate reasons for earning less than his full potential income of \$9.75 per hour. Because Grammar’s testimony supported the court’s conclusion that Kakar was capable of earning this amount, we cannot say the trial court abused its discretion in attributing \$1,688.70 monthly income to Kakar or in using this figure to determine his child support obligation.² *See Little*, 193 Ariz. 518, ¶ 5, 975 P.2d at 110.

²Although Kakar suggests the trial court improperly calculated his gross income based on the income of his family members and his employer, *see* § 25-320 app. § 5(F), the record belies this assertion.

¶7 Kakar nevertheless contends the trial court abused its discretion because it considered outdated information from 2000 in determining the amount of income it attributed to him. He claims the court “ignored the . . . economic reality of the job market in 2008” and did not take into account the fact that he “d[id] not have a car []or a driver[']s license.” The record establishes, however, that Kakar did not have a driver’s license because it had been suspended. A court may refuse to decrease the amount of child support when the circumstances preventing a parent from obtaining employment are the result of the parent’s voluntary conduct. *See* § 25-320 app. § 5(E) (“If earnings are reduced as a matter of choice and not for reasonable cause, the court may attribute income to a parent up to his or her earning capacity.”); *Patterson v. Patterson*, 102 Ariz. 410, 415, 432 P.2d 143, 148 (1967) (allowing court to consider whether father’s own improprieties reduced income).

¶8 Kakar’s remaining contentions are essentially requests that we reweigh the evidence, which we decline to do. “The trial court is in the best position to judge the credibility of the witnesses, the weight of evidence, and also the reasonable inferences to be drawn therefrom.” *Goats v. A.J. Bayless Markets, Inc.*, 14 Ariz. App. 166, 171, 481 P.2d 536, 541 (1971). Accordingly, we defer to the trial court’s assessments of Kakar’s earning capacity, his diligence in searching for a job, and the economic realities he faced. Because the record reasonably supports the court’s factual findings, the court did not abuse its

discretion in attributing \$1,688.70 monthly income to Kakar. *See Little*, 193 Ariz. 518, ¶ 5, 975 P.2d at 110. We therefore affirm the child support order issued on September 5, 2008.³

Contempt

¶9 On September 5, 2008, the trial court found Kakar in contempt of court for failure to pay child support. The court sentenced Kakar to a six-month jail term and suspended the imposition of the sentence on certain conditions. Kakar asks this court to review the trial court's findings of contempt by special action because he claims the contempt adjudication "is not justified." In *Pace v. Pace*, 128 Ariz. 455, 458, 626 P.2d 619, 622 (App. 1981), this court held that "a civil contempt proceeding for failure to pay child support remains procedurally within the scope of A.R.S. [§] 12-864," and "no appeal is available for contempt adjudications under . . . [§] 12-864." We also stated that review of such contempt orders was available only by special action. *Pace*, 128 Ariz. at 457, 626 P.2d at 621.

¶10 We decline special action jurisdiction, pursuant to Rule 7(d), Ariz. R. P. Spec. Actions, given (1) the limited record provided by Kakar of the hearings supporting the contempt findings and (2) the record's indication that at least one review hearing has been

³To the extent Kakar is also challenging the child support order entered on February 15, 2008, that order was a "special order made after final judgment," subject to appeal. *See* A.R.S. § 12-2101(C); *Cone v. Righetti*, 73 Ariz. 271, 275, 240 P.2d 541, 543 (1952). In response to this order, Kakar filed a "Motion for New Trial and Motion for Clarification of Minute Entry and Entry of Findings of Facts and Conclusions of Law." The court deemed this a motion for a new trial and denied the motion in its entirety in June 2008. Because Kakar did not file a timely notice of appeal pursuant to Rule 9(a) or (b), Ariz. R. Civ. App. P., we lack jurisdiction to consider the court's February 15 ruling. *See Patterson*, 102 Ariz. at 415, 432 P.2d at 148.

held in this case while the appeal was pending, which potentially renders the contempt adjudication from September 2008 moot.

Disposition

¶11 For the foregoing reasons, we affirm the trial court's child support order entered September 5, 2008. However, we decline Kakar's invitation to address the court's contempt order by special action.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

GARYE L. VÁSQUEZ, Judge